Filed 12/7/09 TRB Investments v. Fireman's Fund Ins. Co. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TRB INVESTMENTS, INC. et al., Plaintiffs and Appellants, v. FIREMAN'S FUND INSURANCE COMPANY, Defendant and Respondent.	F055111 (Super. Ct. No. S-1500-CV 250247) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Law Office of Timothy L. Kleier, Timothy L. Kleier; Law Office of Mark Ginella, Mark Ginella, for Plaintiffs and Appellants.

Hager & Dowling, Jeffery D. Lim, for Defendant and Respondent.

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Following a remand from the California Supreme Court, the trial court in this case granted summary adjudication against plaintiff policyholders' claim that defendant insurer denied coverage in bad faith. The case proceeded to trial and the policyholders, after prevailing on coverage and contract damages, appealed on the bad-faith issue.

The trial court's decision to grant summary adjudication on the bad-faith claim was based on its finding that the insurer advanced a reasonable interpretation of the policy when it denied coverage. In the course of analyzing the coverage issue, however, the Supreme Court stated that the insurance policy "cannot reasonably be understood" as the insurer understood it. (*TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 22 (*TRB*).) Since the insurer's motion was based only on the claim that its policy interpretation was reasonable, the motion should have been denied. The Supreme Court did not discuss bad faith in its opinion—only the coverage issue was before it—but the implications of its view that the insurer's interpretation was unreasonable are clear.

We also agree with the policyholders' contention that the trial court erred by awarding prejudgment interest on the contract damages only from the date of the Supreme Court's opinion in 2006. The court should have awarded prejudgment interest from the time the insurer denied coverage in 2001. We reverse and remand.

FACTUAL AND PROCEDURAL HISTORIES

The Supreme Court's opinion states the background facts, which we repeat here. The insurer, Fireman's Fund Insurance Company, issued a policy of property and liability insurance to plaintiffs TRB Investments, Inc., Fran Mar Co., Coldwater Farms, P&R Almond Orchards, Inc., Thomas-Cattani, Inc., and 1731 Chester Group. The policy covered a former bank building on Chester Avenue in Bakersfield, which was leased to the Salvation Army. (*TRB, supra*, 40 Cal.4th at pp. 23-24.) It included a vacancy exclusion, stating that the insurer would not pay for water damage (among other losses) occurring in a building that has been vacant for more than 60 consecutive days before the loss. (*Id.* at p. 23.) The policy further provided that a building "'is vacant when it does not contain enough business personal property to conduct customary operations,'" but "'[b]uildings under construction are not considered vacant.'" (*Id.* at p. 24.)

The Salvation Army moved out of the Chester Avenue building at the end of 2000, leaving it without "enough business personal property to conduct customary operations."

The policyholders retained an architect and general contractor to remove interior walls so that the space could be redesigned for a new tenant. The policyholders began negotiating a lease with Goodwill Industries in April 2001 and entered into a lease on July 2, 2001; the lease included the policyholders' agreement to carry out renovations. The contractor did a "walk through" of the building on June 11, 2001, and another, this time with subcontractors, on June 20, 2001. The heating, ventilation, and air conditioning (HVAC) subcontractor made several trips to the building to perform work beginning July 1, 2001. From June 20, 2001 to July 14, 2001, the electrical subcontractor performed work at the building. (*TRB, supra*, 40 Cal.4th at p. 24.)

On Monday, July 16, 2001, workers discovered that a water line or water heater had broken over the weekend and caused water damage. The renovations continued, with the interior of the building demolished to the shell walls and redesigned; new walls, doors, windows, wiring, plumbing, restrooms, and HVAC were installed. The cost of all the renovations was about $1.3 million. (*TRB, supra*, 40 Cal.4th at p. 25.)

The policyholders filed a water-damage claim with Fireman's Fund on July 18, 2001; on August 14, 2001, they submitted invoices for repair work totaling $155,261.68. Fireman's Fund denied the claim in a letter dated December 7, 2001. Relying on the vacancy clause, adjuster Anne-Marie Schmoeckel stated that there was no coverage because "the demolition for the tenant[']s improvements started on August 16, 2001, which is some 30 days after this water damage occurred." The policyholders retained counsel, who wrote to Fireman's Fund that the renovations began several weeks before the loss. After further correspondence, Fireman's Fund reiterated its denial of coverage in a letter dated December 6, 2002. Schmoeckel took note of the activities of contractors and subcontractors in the building in June and July 2001, but stated that these activities did not "mean that the building was 'under construction'" as that term was used in the policy. Instead, the work constituted renovation. "Renovation means renovation, additions means additions, and 'under construction' means 'under construction,'"

Schmoeckel concluded. In the alternative, she asserted that the described activities would not constitute construction even if renovation were a type of construction. A demolition permit had not yet been obtained and the electrical and HVAC work was merely preparatory to construction or renovation.

The policyholders filed the complaint initiating this litigation on May 19, 2003. It alleged that, by denying coverage, Fireman's Fund breached the insurance contract and violated the implied covenant of good faith and fair dealing. It prayed for contractual damages, punitive damages, attorneys' fees, and a declaration that Fireman's Fund was liable. The claim for attorneys' fees was based on *Brandt v. Superior Court* (1985) 37 Cal.3d 813 and required proof of bad faith. In their briefs in the present appeal, the policyholders claim their attorneys' fees exceed $400,000.

Fireman's Fund moved for summary judgment or summary adjudication. It argued that, while no California case law existed on the issue, the trial court should rule as a matter of law that a construction exception to a vacancy exclusion like the one in Fireman's Fund's policy encompasses only new construction, not renovation. The trial court agreed and granted summary judgment for Fireman's Fund. We affirmed in case No. F045816, filed July 15, 2005.

The Supreme Court reversed on November 13, 2006. It held that the relevant inquiry was not whether the work was new construction or renovation, but whether there was a "substantial and continuing presence of workers at the premises." (*TRB, supra*, 40 Cal.4th at p. 22.)

The Supreme Court remanded the matter to the trial court "to permit either party to bring a new summary judgment motion based upon the proper standard." (*TRB, supra,* 40 Cal.4th at p. 23.) Although the facts described above were undisputed, other facts were necessary to determine whether there was a continuous and substantial presence of workers on the property before the loss:

> "It is true that there is no dispute regarding the facts elicited by the parties here. However, since they were unaware of the standard we adopt today, the parties did not elicit key facts which might have a bearing on the relevant inquiry, i.e., whether the construction project here was such that there were substantial continuing activities on the premises during the relevant period (here, within 60 days prior to the loss). The record reflects that electrical and HVAC subcontractors engaged in various activities at the building, and that various other personnel, such as the contractor and the architect, also spent time there in the weeks prior to the loss at issue. But, the record does not disclose the number of people associated with the construction project, how many hours per day or days per week they were in the building, and how much of the building was occupied by these persons at any given time. Those and similar facts would be needed to determine whether there was a substantial continuing presence of construction personnel." (*TRB, supra,* 40 Cal.4th at p. 31.)

As the Supreme Court anticipated, Fireman's Fund filed a new motion for summary judgment or summary adjudication in the trial court on remand. Despite the Supreme Court's statement that additional facts were needed, however, Fireman's Fund's new statement of undisputed facts was nearly identical to its previous statement of undisputed facts. It did not add facts about "the number of people associated with the construction project, how many hours per day or days per week they were in the building, and how much of the building was occupied by these persons at any given time." (*TRB, supra,* 40 Cal.4th at p. 31.) In their opposition to the motion, by contrast, the policyholders did submit additional evidence relevant to the new standard, including a declaration tabulating 884 person-hours of work on the building between June 20 and July 14, 2001.

In May 2007, while the motion was pending, Fireman's Fund tendered, and the policyholders accepted, a check for $163,024.76, representing the $155,261.68 in receipts the policyholders had submitted plus interest for six months, the period since the Supreme Court ruled. The letter's explanation of the reversal of Fireman's Fund's coverage

position was ambiguous, seeming both to assert and to deny that the Supreme Court's decision prompted the insurer's action:

> "After the Supreme Court changed the law in this case, we have reconsidered the claim in light of all available evidence. While we still believe that the evidence does not show that the building was 'under construction' by the new meaning stated in the Supreme Court decision, we have decided to extend coverage for the claim."

In spite of its decision to cover the claim, Fireman's Fund did not withdraw any part of its motion for summary judgment or summary adjudication. At one of the hearings on the motion, Fireman's Fund's counsel said, "[R]eally, what's left is a big bad faith case," but "we are still moving forward with the summary judgment on all of the issues."

On September 7, 2007, the trial court denied the motion with respect to the policyholders' claim for breach of contract. It granted summary adjudication for Fireman's Fund, however, on the bad-faith claim. The court stated that the Supreme Court established a new rule when it held that construction is not limited to new construction within the meaning of the policy, and Fireman's Fund's "failure to anticipate that new rule cannot be unreasonable." The court also granted summary adjudication for Fireman's Fund on the policyholders' claim for punitive damages. A trial date was set for the remaining issues.

The policyholders filed a motion for reconsideration. They argued, among other things, that Fireman's Fund acted in bad faith when it continued to dispute the coverage issue after the Supreme Court's decision. Shortly afterward, and shortly before trial, Fireman's Fund informed the policyholders that it would not dispute coverage at trial, leaving only the amount of the loss and the date from which interest would accrue for resolution.

The hearing on the motion for reconsideration and a bench trial both took place on November 20, 2007. The parties stipulated that Fireman's Fund had paid $163,024.76 and would pay an additional $5,444.75. The policyholders contended that Fireman's

Fund was liable for interest from the time in 2001 when the damages became certain. They also argued that Fireman's Fund was liable for $25,708.25 in lost rents because of the water damage. Fireman's Fund argued that interest was due only from the date of the Supreme Court's decision, November 13, 2006, and that it was liable either for no lost rents or for lost rents of only $14,927.37.

The court denied the motion for reconsideration and took the case under submission. In its judgment filed on February 2, 2008, it ordered Fireman's Fund to pay $14,927.37 plus interest from the date of the Supreme Court's decision.

DISCUSSION

I. Summary adjudication

The policyholders argue that the trial court erred when it granted Fireman's Fund's motion for summary adjudication on the issue of bad faith. We review an order granting summary adjudication under the same standard as an order granting summary judgment. (*Lindstrom v. Hertz Corp.* (2000) 81 Cal.App.4th 644, 648.) Our review is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We independently review the record and apply the same rules and standards as the trial court. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.) The trial court must grant the motion if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra,* at p. 850.) We view the facts in the light most favorable to the nonmoving party and assume that, for purposes of our analysis, this version of all disputed facts is correct. (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 159.)

If an insurer unreasonably denies benefits for a covered loss, it is liable for violating the covenant of good faith and fair dealing implied in the contract between the insurer and insured. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 573-574.) The denial must be both erroneous and unreasonable; an erroneous denial alone does not support bad-faith liability. (*Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205.) Despite the name of the doctrine ("bad faith"), the insurer's subjective intent and subjective understanding of the law are irrelevant. There is no bad-faith liability if the insurer's position was objectively reasonable even if the insurer lacked actual subjective knowledge of the reasonable basis for that position. (*Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973.)

An insurer can violate the covenant through a denial of coverage based on an unreasonable *position on an issue of law*, such as the interpretation of a policy exclusion (e.g., *Opsal v. United Services Auto. Assn., supra*, 2 Cal.App.4th at pp. 1202, 1205-1206), or by failing to make a reasonable *investigation of the facts* before denying coverage (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819), among other ways.

Here the policyholders claim Fireman's Fund breached the covenant both by unreasonably interpreting the construction exception to the vacancy exclusion and by failing to make a reasonable investigation of the facts regarding the renovation work. Fireman's Fund argues that its policy interpretation was reasonable and, since the interpretation excluded all renovation periods from coverage and the work was undisputedly a renovation, there was no need for additional factual investigation. The trial court agreed with Fireman's Fund that its interpretation was reasonable and therefore no further factual investigation was necessary. As the issue has been framed by the parties and the trial court's ruling, therefore, summary adjudication was appropriate if and only if the insurer's policy interpretation was reasonable.

We hold that granting the insurer's motion for summary adjudication was erroneous because the insurer's policy interpretation was unreasonable. This conclusion

is required because the Supreme Court expressly stated that the insurer's policy interpretation was unreasonable:

> "We reverse the Court of Appeal. As used in the insurance policy here, the word 'construction' cannot reasonably be understood to be limited only to the erection of a new structure. Rather, the term contemplates all building endeavors, whether classified as new construction, renovations, or additions, which require the substantial and continuing presence of workers at the premises. This standard serves the purposes underlying the vacancy exclusion, which is premised upon the recognition that unoccupied properties face an increased risk of damage, whether from property-related crime such as theft or vandalism or from building damage or loss related to neglect. If, however, a construction project results in the continuous and substantial presence of workers on the property, then the underlying justifications for the vacancy exclusion no longer exist, a point recognized by the inclusion of an 'under construction' exception to the general vacancy exclusion." (*TRB, supra*, 40 Cal.4th at pp. 22-23.)

The trial court and Fireman's Fund have focused on the Supreme Court's later remark that its view was "more reasonable" than our prior view (*TRB, supra,* 40 Cal.4th at p. 29); they assert that this means our prior view is not unreasonable, but merely less reasonable, than the Supreme Court's view. In light of the context of the Supreme Court's "more reasonable" remark, this position is unpersuasive. The remark appears a few sentences after the court asserts that the insurer's interpretation "makes little sense." (*Ibid.*) A reasonable view is more reasonable than an unreasonable view, and its seems this is how the court was using the phrase.

Our holding does not establish bad faith as a matter of law. Nothing we have said prevents the insurer from attempting to show on remand that its denial of coverage was reasonable even though its policy interpretation was not. For instance, it could try to prove that, when it denied coverage, it had gathered enough facts to reasonably, though mistakenly, conclude that there was no substantial and continuing presence of workers at the premises when the loss occurred. We express no opinion on the merits of such an attempt, should one be made.

II. Prejudgment interest

The policyholders argue that the court erred when it ruled that prejudgment interest could be awarded only from the date of the Supreme Court's decision, November 13, 2006. They say the interest obligation began running when the amount of the damages was ascertained, in August 2001.

Civil Code section 3287, subdivision (a), provides:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

The policyholders assert—and Fireman's Fund concedes—that the damages were able to be made certain in August 2001. The parties agree that there is no factual dispute about this and that only a question of law exists, to be decided de novo. This question is when the policyholders' right to payment became "vested" within the meaning of the statute.

The sentence from section 3287 quoted above was enacted in 1872 and subsequent amendments to the statute have not altered this provision. (Historical and Statutory Notes, 12 West's Ann. Civ. Code (1997 ed.) foll. § 3287, p. 49.) Courts have long interpreted it to mean that, if damages are certain or able to be made certain, the right to recover the money is vested and interest on it begins to run when the money is "due" or "'due and payable.'" (*Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 754; *Budget Finance Plan v. Sav-On Food Club* (1955) 44 Cal.2d 565, 572, fn. 6; *A-1 Door & Materials Co. v. Fresno Guar. Sav. & Loan Assn.* (1964) 61 Cal.2d 728, 737.) In insurance cases, payment has been held to be due and payable at the time when the policy would have required payment for a covered loss, or else when the insurer denied coverage. (*Koyer v. Detroit F. & M. Ins. Co.* (1937) 9 Cal.2d 336, 345-346 [where policies provided that earthquake loss was payable 90 days after receipt of proofs of loss by insurer, interest on loss ran from that date]; *Executive Aviation, Inc. v. National Ins.*

Underwriters (1971) 16 Cal.App.3d 799, 808 [interest on damages recovered by insured runs from date on which payment was due under terms of policy, where insured had furnished data from which loss could be ascertained and data were not substantially disputed by insurer]; *Slobojan v. Western Travelers Life Ins. Co.* (1969) 70 Cal.2d 432, 443 [prejudgment interest on life insurance policy ran from time insurer denied coverage]; *Chase v. National Indem. Co.* (1954) 129 Cal.App.2d 853, 865 [where insured promptly notified insurer of amount of damage to insured equipment, interest ran from date insurer denied liability].) Interest runs from a date "not later than" the date the insurer denied coverage (*Chase v. National Indem. Co.*, *supra*, at p. 865); if the policy terms required payment on an earlier date, interest runs from that earlier date.

Fireman's Fund and the trial court have cited no authority, and we have found none, that would support limiting the interest obligation to the time since the Supreme Court's decision. In effect, Fireman's Fund asks us to create an exception for situations in which liability is established via a new rule announced by a court. Fireman's Fund argues that this would be fair because it could not know the loss was covered until the rule was announced. It could be no more certain, however, that the loss was not covered, for there was no old rule that favored its position. More importantly, the predictability of the outcome is not relevant, for the purpose of Civil Code section 3287 is to make "the plaintiff whole 'for the accrual of wealth which could have been produced during the period of loss.'" (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958.) Fireman's Fund gambled and lost; and while it was gambling, it had the use of its insureds' money while they were deprived of the use of it. Creating an exception to the general rule would undermine the purpose of making plaintiffs whole. At the same time, it would create a windfall for defendants in contract disputes where the law is unsettled at the outset but becomes settled in the plaintiffs' favor through litigation. These defendants would enjoy the free use of money rightfully belonging to their counterparties until a court resolved the legal issue.

The prejudgment interest in this case, therefore, runs from the earlier of the date by which the policy would have required a covered loss to be paid or the date on which Fireman's Fund denied coverage. Fireman's Fund denied coverage in its letter of December 7, 2001, which stated that it "constitutes our formal position regarding the claim" and was "our formal notification to you of our position regarding your claim."

The policyholders have not directed our attention to any policy terms that required payment on an earlier date. They argue that interest should run from August 14, 2001, when they submitted the $155,261.68 in receipts, since this is the date on which the damages were certain. In saying this, the policyholders appear to confuse Civil Code section 3287's requirement that damages be "certain, or capable of being made certain by calculation," with its notion of a "right to recover which is vested … upon a particular day …." There is no reason to think that the policy's terms required payment to be made the very day the damages became certain. The date of denial therefore controls and prejudgment interest is due from December 7, 2001.

The judgment entered refers only to the $14,927.37 for lost rents that Fireman's Fund had not paid by the time of trial. While the case was under submission in the trial court, however, the parties filed a stipulation in which it was presupposed that if the court awarded interest from a date earlier than the date of the Supreme Court's decision, interest would be payable on the entire amount of the covered loss. A portion of the interest was included in the payment Fireman's Fund made in May 2007. The trial court's judgment on remand should take account of these facts.

DISPOSITION

The order granting summary adjudication against the policyholders' bad-faith claim is reversed and the case is remanded for further proceedings. The judgment

following the proceedings on remand shall include prejudgment interest for the covered loss running from December 7, 2001. Appellants shall recover their costs on appeal.

_____
Wiseman, J.

I CONCUR:

_____
Gomes, J
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DISSENTING OPINION OF ARDAIZ, P.J.

I respectfully dissent from part "I" of the majority opinion and from that portion of the disposition reversing the superior court's order granting summary adjudication for the insurer on the insured's bad faith cause of action. As I shall explain, in my view the superior court correctly concluded that the genuine dispute rule applies and that the insurer is entitled to summary adjudication in its favor.

"In addition to the duties imposed on contracting parties by the express terms of their agreement, the law implies in every contract a covenant of good faith and fair dealing. [Citation.]" (*Egan v. Mutual of Omaha* (1979) 24 Cal.3d 809, 818 (*Egan*).) "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. [Citation.]" (*Comunale v. Traders & General Ins. Co*. (1958) 50 Cal.2d 654, 658 (*Comunale*); in accord, see also *Crisci v. Security Ins. Co*. (1967) 66 Cal.2d 425, 429 (*Crisci*); *Gruenberg v. Aetna Ins. Co*. (1973) 9 Cal.3d 566, 573 (*Gruenberg*); *Silberg v. California Life Ins. Co*. (1974) 11 Cal.3d 452, 460 (*Silberg*); *Johansen v. California State Auto Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 14; *Murphy v. Allstate Ins. Co*. (1976) 17 Cal.3d 937, 940 (*Murphy*); *Egan, supra*, 24 Cal.3d at p. 818; *Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208, 214-215 (*Frommoethelydo*); *Wilson v. 21st Century Ins. Co*. (2007) 42 Cal.4th 713, 720 (*Wilson*).) "This principle is applicable to policies of insurance. [Citations.]" (*Comunale, supra*, 50 Cal.2d at p. 58; in accord, see also *Crisci, supra*, 66 Cal.2d at p. 429; *Gruenberg, supra*, 9 Cal.3d at p. 575; *Murphy, supra*, 17 Cal.3d at p. 940.) "[W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Gruenberg, supra*, 9 Cal.3d at p. 575; in accord, see also *Silberg, supra*, 11 Cal.3d at pp. 460-461.) "[A]n insurer is obligated to give the interests of the insured at least as much consideration as it gives to its own interests." (*Silberg, supra*, 11 Cal.3d at p. 460; in accord, see *Egan, supra*, 24

Cal.3d at pp. 818-819; *Frommoethelydo, supra,* 42 Cal.3d at pp. 214-215; *Wilson, supra,* 42 Cal.4th at p. 720.)

"[A]n insurer's denial of or delay in paying benefits gives rise to tort damages only if the insured shows the denial or delay was unreasonable." (*Wilson, supra*, 42 Cal.4th at p. 723.) "The substance of a bad faith action in ... first party matters is the insurer's unreasonable refusal to pay benefits under the policy." (*Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 127.) "It is now clear under California law that an insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages. '[T]he ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits was *unreasonable*.'" (*Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205.) "In other words, 'before an [insurer] can be found to have acted tortiously, i.e., in bad faith, in refusing to bestow policy benefits, it must have done so "'without proper cause."'" (*Ibid*.)

"As a close corollary of that principle, it has been said that 'an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract.' [Citation.]" (*Wilson, supra*, 42 Cal.4th at p. 723; in accord, see also *Chateau Chamberay Homeowners Ass'n. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 347 (*Chateau Chamberay*); *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 (*Jordan*); *Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1237 (*Bosetti*).) "The term 'bad faith,' as used in the context of an insured's claim against his or her own insurer, is simply a shorthand reference to a claimed breach by the insurer of the covenant of good faith and fair dealing that is implied in every contract of insurance." (*Bosetti, supra*, 175 Cal.App.4th at p. 1235.) This is the so-called "'genuine dispute' or 'genuine issue' rule." (*Wilson, supra*, 42

Cal.4th at p. 723.) "The mistaken [or erroneous] withholding of policy benefits, if reasonable or if based on a legitimate dispute as to the insurer's liability under California law, does not expose the insurer to bad faith liability." (*Tomaselli v. Transamerica Ins. Co*. (1994) 25 Cal.App.4th 1269, 1280-1281; *Chateau Chamberay, supra,* 90 Cal.App.4th at p. 346.) "'[A]n insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims.'" (*Jordan, supra*, 148 Cal.App.4th at p. 1072; in accord, see also *Bosetti, supra*, 175 Cal.App.4th at p. 1237, fn. 20.) "'[A] rule has never been applied which holds under any circumstances that an insurer which refuses to pay benefits claimed to be due under the policy did so at its own risk. Clearly, both logic and good policy dictate that no such rule ever be applied in first party cases.'" (*Jordan, supra*, 148 Cal.App.4th at p. 1072.) "An insurer is not a fiduciary, and owes no obligation to consider the interests of its insured above its own. [Citation.] 'An insurer ... may give its own interests consideration equal to that it gives the interests of its insured [citation]; it is not required to disregard the interests of its shareholders and other policyholders when evaluating claims [citation]; and it is not required to pay noncovered claims, even though payment would be in the best interests of its insured [citation]." (*Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973-974 (*Morris*).) "Where there is a *genuine issue* as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute." (*Jordan, supra*, 148 Cal.App.4th at p. 1072; in accord, see *Bosetti, supra*, 175 Cal.App.4th at p. 1237, fn. 20.)

The genuine dispute rule applies to "disputes over policy interpretation." (*Wilson, supra,* 42 Cal.4th at p. 723; in accord, see also *Morris, supra*, 109 Cal.App.4th at pp. 973-974.) "'The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the

insurer's denial of benefits was reasonable -- for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law.'" (*Wilson, supra*, 42 Cal.4th at p. 724; in accord, see also *Bosetti, supra*, 175 Cal.App.4th at pp. 1237-1238.) "Moreover, the reasonableness of the insurer's decisions and actions must be evaluated as of the time that they were made; the evaluation cannot fairly be made in the light of subsequent events that may provide evidence of the insurer's errors." (*Chateau Chamberay, supra*, 90 Cal.App.4th at p. 347; in accord, see also *Jordan, supra*, 148 Cal.App.4th at p. 1073; *Bosetti, supra*, 175 Cal.App.4th at p. 1238, fn. 21.)

It is this last basic principle of law that leads me to part company with the majority. The majority opinion appears to conclude either that Fireman's Fund breached the covenant of good faith and fair dealing that is implied in its insurance contract with TRB, or that there is some triable issue of fact as to whether Fireman's Fund breached that implied covenant of good faith and fair dealing. The basis for this conclusion appears to be something that occurred several years after the Fireman's Fund adjuster informed TRB that the building in question was not "under construction" -- the California Supreme Court's decision in *TRB Investments, Inc. v. Fireman's Fund Ins. Co*. (2006) 40 Cal.4th 19 (*TRB*). The majority opinion appears to read the California Supreme Court's decision in *TRB, supra*, as holding, or at least requiring the conclusion, that Fireman's Fund breached the implied covenant of good faith and fair dealing by arguing (successfully to two courts, including this one on which two of the justices in the majority participated) that renovations on an existing building do not render that building "under construction." While our high court rejected my colleagues' interpretation, I do not so read the *TRB* decision.

"[I]t is axiomatic ... that a decision does not stand for a proposition not considered by the court." (*People v. Harris* (1989) 47 Cal.3d 1047, 1071; in accord, see also *People v. Barker* (2004) 34 Cal.4th 345, 354; *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335,

345; *Agnew v. State Board of Equalization* (1999) 21 Cal.4th 310, 332; *People v. Myers* (1987) 43 Cal.3d 250, 265, fn. 5, and *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) Nothing in the *TRB* opinion purports to say that Fireman's Fund acted in bad faith in denying coverage of TRB's claim. The opinion does not even say that Fireman's Fund erred in concluding there was no coverage. Rather, the opinion states "whether the loss here should be covered under the policy would seem a close issue which cannot be resolved on the facts currently before us." (*TRB, supra,* 40 Cal.4th at p. 31.) The California Supreme Court noted that "[t]he proper interpretation of the 'under construction' clause poses an issue of first impression in the courts of this state." (*Id*. at p. 26.) That court interpreted the "under construction" language, and expressly observed that "the parties here were unaware of this standard when litigating defendant's summary judgment motion." (*Id*. at p. 23.) The court did not say or suggest that either side violated the implied covenant of good faith and fair dealing by failing to advocate the meaning of the phrase "under construction" explained in the *TRB* decision before the court issued its November 2006 decision containing that explanation. Furthermore, as the *TRB* decision expressly stated: "It has been held in some quarters that the word 'construction' does not encompass repairs, renovations, and comparable work on an existing building." (*TRB, supra,* 40 Cal.4th at pp. 26-27.) The opinion then cited out-of-state decisions so holding. (*Ibid*.)[1] The *TRB* decision made no attempt to explain why

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[1] For example, in *Myers v. Merrimack Mutual Fire Insurance Company* (7th Cir. 1986) 788 F.2d 468 (*Myers*), cited by the California Supreme Court in *TRB, supra*, 40 Cal.4th at p. 27, the court stated: "Plaintiff … argues that 'construction' is an ambiguous term that includes renovations. We disagree. Several state courts have held that in an insurance policy, the term construction does not include repairs, maintenance, reconstruction, renovation and the like to an already existing structure. *Travelers Indemnity Co. v. Wilkes County*, 102 Ga.App.362, 116 S.E.2d 314, 317 (1960*); Crescent Co. of Spartenburg, Inc. v. Insurance Co. of North America*, 266 S.C. 598, 225 S.E.2d 656, 658 (1976). Many state courts have made this same distinction in defining the term

Fireman's Fund could not properly or reasonably rely on that existing authority to argue (even though the argument was ultimately unsuccessful) that a building which already existed before renovation work on it began was no longer a building "under construction." In my view, this was not an inadvertent omission from the decision. The reason why no such explanation appears would seem to be simply that the court was not addressing the issue of either party's compliance with or breach of the implied covenant of good faith and fair dealing. To state this a bit differently, the court did not intend to say, and did not say, that the insurer could not "reasonably" make the argument it made, even though that argument was ultimately unsuccessful. Nor do I see how the court could have so stated unless it wished to make a sea change in the law of bad faith -- an area of law that the court nowhere addressed in its *TRB* decision. "[If] an insurance company's denial of coverage is reasonable, as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company's position is *later* rejected by our state Supreme Court." (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 179.)

The majority opinion states: "Our holding does not establish bad faith as a matter of law. Nothing we have said prevents the insurer from attempting to show on remand

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construction in other contexts. *Commonwealth v. Brown*, 391 Mass. 157, 460 N.E.2d 606, 609 (1984); *Muirhead v. Pilot Properties, Inc*., 258 So.2d 232, 233 (Miss 1972); *Commonwealth v. McHugh*, 406 Pa. 566, 178 A.2d 556, 558 (1962); *People v. NY Central RR Co*., 397 Ill. 247, 250, 23 N.E.2d 302 (1947); *Julius v. Lenz*, 215 Minn. 106, 9 N.W.2d 255, 257 (1943); *People v. Olsen*, 32 N.Y.S.2d 63, 65, 66 (1941). Moreover, this distinction accords with the probable purpose of this clause. Such a clause balances a willingness to extend coverage through the construction period with a desire to guard against excessive vandalism that occurs when a dwelling is vacant, *Crescent*, 255 S.E.2d at 658, and the interpretation urged by plaintiff would intolerably alter this balance by greatly extending the 'construction' period to include any time during which some repairs or renovations are being made. The 'construction' period cannot go on forever. See *Rogers v. Aetna Casualty & Surety Co*., 601 F.2d 840, 844 (5thCir. 1979)." (*Myers, supra*, 788 F.2d at p. 472.)

that its denial of coverage was reasonable even though its policy interpretation was not." (Maj. opn. at p. 9.) However, nothing in the majority opinion points to any cognizable disputed fact to be shown or how exactly under the majority's interpretation the insurer is to show their denial of coverage was in good faith. The insurer's denial of coverage was based upon its interpretation of the insurance policy, and particularly upon its view that renovations on an existing building do not render that building "under construction." Notwithstanding the majority's stated assertion that "[o]ur holding does not establish bad faith as a matter of law," it appears to do just that. The majority opinion states "[w]e hold that … the insurer's policy interpretation was unreasonable" (maj. opn. at p. 8) and rejects any application of the genuine dispute rule. If an insurer's rejection of an insured's claim is based on a policy interpretation that is "unreasonable" under principles of law pertaining to bad faith (i.e., if there is no genuine dispute between the insurer and the insured over the meaning of the policy language), and if the insured's claim ultimately turns out to be covered under the policy, then I fail to see how the insurer's denial of coverage could be anything other than a breach of the covenant of good faith and fair dealing. In short, the majority opinion appears to me to bind the superior court to a conclusion that the insurer breached the implied covenant of good faith and fair dealing by making a tenable legal argument that was rejected. The majority opinion does in effect what it declines to do expressly. And it does so erroneously, in my view, because it fails to give due consideration to the state of the law at the time the insurer's determination to deny coverage was made.

In my view, the majority opinion confuses a legal issue with a factual issue. It exposes any insurer to a bad faith claim simply by losing a "genuine dispute." Alternatively it would conclude that any genuine legal dispute becomes a factual dispute as to whether the arguable legal position was reasonable simply because it was rejected. This conclusion turns the genuine dispute rule on its head and exposes an insurer to a bad faith claim simply by losing a legal argument. An insurer is "entitled to argue for

whatever interpretation of the law and policy language most benefited its own interests" and "[t]he sole issue ... is whether the position it took was objectively reasonable in light of the law that existed" when the decision to deny coverage was made. (*Morris, supra,* 109 Cal.App.4th at p. 974.) That is what the insurer did here.

I would further respectfully note that to reach the conclusion of the majority opinion, one must conclude that not only was the position of the insurer unreasonable but so was the position of the superior court upholding that position as well as the unanimous position of the justices of this court who upheld that position. Without belaboring the irony of the majority interpretation, it would appear the majority agrees their original conclusion of a "reasonable interpretation" was frivolous. That said, how can the majority reach the conclusion there is any issue of fact remaining as to good faith?

While I acknowledge that this court occasionally errs, that does not mean the position ultimately reached takes the rejected position outside of the "genuine dispute" rule. It simply means there is a difference of opinion. This is particularly so in a case of first impression where the insurer's position has been upheld by two courts on, in part, authorities from other jurisdictions upholding that position. I would not reverse that portion of the judgment granting summary adjudication in favor of the insurer on the insured's bad faith cause of action.

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ARDAIZ, P.J.